Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-306

MILTON EVEREST MITCHELL,

Petitioner,

against

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No.

MILTON EVEREST MITCHELL,

Petitioner,

against

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Milton Everest Mitchell prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in this case on April 7, 1976.

Opinion Below

The Court of Appeals did not render any opinion in this case, except an unreported memorandum set forth in the judgment of this case, which is reprinted herein as Appendix "A", infra.

Jurisdiction

The judgment of the Court of Appeals was entered on April 7, 1976. A timely petition for rehearing and for rehearing *en banc* was denied on June 2, 1976. On August

5, 1976 a motion to reconsider such denial was likewise denied. The judgment of the Court of Appeals and the orders denying rehearing and rehearing *en banc* are reprinted as Appendix "A", *infra*. The jurisdiction of this Court is invoked under Title 28, United States Code, § 1254(1).

Questions Presented

1. Whether, under the mandate in 8 U.S.C. § 1105(a)(4), that deportation orders be reviewed for substantiality of supporting evidence in the record as a whole, petitioner's deportation order, for "entry without inspection upon a false claim of citizenship", should have been reviewed through consideration of all available evidence, which petitioner cited to show that his claim of citizenship was not accepted and did not defeat the inspection process required for aliens.

2. Whether findings of fact articulated as the basis for a discretionary denial of voluntary departure in lieu of deportation, are reviewable by the substantial evidence standard of 5 U.S.C. § 706(2)(E); since such denial, a part of the "deportation order" mentioned in 8 U.S.C. 1105(a)(4), is provided by § 1254(e) to be made in the deportation hearing.

Constitutional Provision Involved

AMENDMENT V

"No person shall • • • be deprived of life, liberty, or property, without due process of law. • • •"

Statutes and Regulations Involved

The statutes involved are the Immigration and Nationality Act (Title 8, United States Code) and the Administrative Procedure Act (Title 5, United States Code, § 551,

et seq.). The relevant provisions are 8 U.S.C. § 1105(a)(4), § 1251(a)(2) and (f), § 1254(e); and 5 U.S.C. § 706(2)(A) and (E). Since these provisions are lengthy, their pertinent text is set forth as Appendix "B", infra, p. B-1 to B-3. The regulation involved is Title 8 CFR Part 235.1(b), which is also reprinted as part of Appendix "B", infra, p. B-4

Statement of the Case

Milton Everest Mitchell seeks review of a memorandum judgment of the Court of Appeals for the Second Circuit which upheld a final order of deportation of the Board of Immigration Appeals.

The Facts

Petitioner, Milton Everest Mitchell, is a 38-year old alien, native and citizen of Trinidad. He is the husband of a United States citizen and the father of two United States citizen children. Petitioner first entered the United States in 1960, with a visitor's visa, and except for a short departure and return in 1961, had resided continuously in the United States for more than thirteen years, before going to Canada in 1974, on a week-end trip to participate in a well-known Caribbean festival. However, during this thirteen-year period petitioner had never adjusted his status under benefits available to long-term out-of-status residents; nor did he apply for immigrant status through a petition filed on his behalf by an immediate relative United States citizen.

On August 5, 1974, petitioner without any luggage and in a Canadian taxicab presented himself for immigration inspection at the Rainbow Bridge, in Niagara Falls, New York, indicating that he had spent a three-day week-end in Toronto, Canada, and that he was on his way to his home in New York City. Petitioner stated that he was Wesley Oliver, a citizen of the United States, and except

for a birth certificate in the name of Wesley Oliver, petitioner had no other form of identification. Two immigration inspectors and a Border Patrol Agent questioned petitioner intently for over an hour about his identity, his claim of United States citizenship, his having no luggage and his having only the birth certificate of Wesley Oliver. After petitioner explained that he was going to board a Greyhound bus and continue on to his home in New York City, he was permitted to proceed to the bus station which was 500 yards distant from the inspection station.

However, at that very moment petitioner was put under immediate and continuous surveillance for six hours by the Border Patrol Agent. The surveillance began at on or about 10:30 a.m. and terminated at 5:00 p.m. when petitioner was arrested by the Border Patrol Agent, who had with him a Warrant of Arrest and deportation charges in the form of an "Order to Show Cause", already drawn up at 4:00 p.m. The arrest occurred at the bus station in the immediate vicinity of the port of entry, where petitioner had remained during the entire six-hour surveillance period.

Chronology of Proceedings Below

On August 6, 1974 petitioner was given a deportation hearing under a charge that he had entered the United States without inspection upon a false claim of citizenship. [8 U.S.C. § 1251(a)(2)]. Petitioner was not represented by counsel at these proceedings. At that hearing, his pleading to the charge consisted of only an admission that he had claimed American citizenship during the initial questioning at the border. There was never any mention made concerning the initial doubts of his claim of United States citizenship during the hour-long investigation and interrogation to which he had been subjected, or the continuous six-hour surveillance culminating in his arrest under already prepared deportation charges. Petitioner conceded deportability and he was found deportable as charged.

Following the determination that deportability was established, petitioner was advised by the immigration judge to apply for voluntary departure in lieu of deportation. In the part of the hearing devoted to this question, the immigration trial attorney and the immigration judge took petitioner to task for being in the company of females other than his wife, on a trip on which he did not take his wife; and the immigration judge proceeded to make a finding that petitioner "probably" committed adultery on the holiday week-end, notwithstanding his specific denial of such conduct. The immigration judge also took petitioner to task for having a lawyer apply for an extension of time to file a then current income tax return and proceeded to construe such application, and petitioner's buying of an expensive automobile, as a wilful failure to pay current income taxes. Added to these "findings" of ineligibility for voluntary departure was the element that petitioner deliberately sought re-entry into the United States through the fraudulent use of another's birth certificate, which itself, was a prime element of deportability under 8 U.S.C. § 1251(a)(2). In favor of petitioner's application for relief were the elements of his being the husband of a United States citizen, his being the father of two United States citizen infant children, and his continuous United States residence for over thirteen years. However, the foregoing three adverse "factors" alleged to exist were deemed to outweigh the favorable factors.

Voluntary departure in lieu of deportation was denied by the immigration judge and an appeal against this denial was timely filed with the Board of Immigration Appeals. However, while the appeal was pending there was merged into it a request for relief of statutory waiver of deportation under 8 U.S.C. § 1251(f), pursuant to the law as it existed before this Court's decision in *Reid* v. *INS*, 420 U.S. 619 (1975). Oral argument before the Board was limited to the issue of voluntary departure, with leave to

submit supplemental arguments on the request for relief under 8 U.S.C. § 1251(f), on the issue then pending before this Court. *Reid* was decided by this Court during the pendency of this case.

Those supplemental arguments were submitted, but only as being contingent upon the outcome of a separate request for the separate relief of non-deportability, pursuant to the guidelines set down in *Reid*. *Reid* held, in effect, that deportability is established for "entry without inspection upon a false claim of citizenship", when the accepted claims of citizenship *defeats* the inspection process for aliens. Petitioner asked for a reopening of proceedings so that he could establish that his claim of citizenship did not defeat full inquiry as to his admissibility as an alien, and therefore, that he was not deportable for "entry without inspection" within the meaning of this Court's decision in *Reid*. The new evidence submitted was contained in an affidavit of the Border Patrol Agent and was supplemented by affidavits of petitioner and Patsy Gully, one of two females mentioned in the Border Patrol Agent's affidavit.

The Board affirmed the denial of voluntary departure, and rejected petitioner's argument that if he could establish that the inspection process was not frustrated through his claim of citizenship, he could establish thereby that he was not deportable as charged. Contingent relief for statutory waiver of deportation under 8 U.S.C. § 1251(f), was also denied because of its unavailability to persons found deportable for entry without inspection upon a false claim of citizenship.

Petitioner then petitioned for review in the Court of Appeals, requesting a remand to the administrative authorities for redetermination of the issues, alleging that there was a lack of substantial evidence in the record to sustain deportability for entry without inspection, as well as a lack of substantial evidence to sustain the findings articulated as the basis for denying voluntary departure in lieu of deportation.

Reasons for Granting the Writ

This case presents two important issues concerning judicial review of administrative findings of fact, issues which previously have not been, but should now be, resolved by this Court.

The first issue raises the question of whether the Courts of Appeals must consider all available evidence cited to show non-deportability, in order to carry out the statutory mandate that deportation orders be reviewed for substantiality of supporting evidence in the record as a *whole*. The second issue is broader based and in the general context of the Administrative Procedure Act, raises the question of whether 8 U.S.C. § 1254(e), provides for discretionary grants of voluntary departure in lieu of deportation to be made in the deportation hearing; and whether, by reason of such provision, and notwithstanding the discretionary nature of the determination, there must nonetheless be substantial evidence in the record to support those findings of fact articulated as the basis for exercising discretion. In the narrower context of judicial review under the Immigration and Nationality Act, this second issue may be stated in terms of whether the scope of review applicable to *findings of fact* supporting the deportation order is uniformly applicable to all constituent elements of the deportation order, including denials of discretionary relief as well as rulings as to deportability.

While the first issue may be regarded as being of principal significance to deportation proceedings under the Immigration and Nationality Act, the second issue appears to be of broader significance in other areas of administrative law, where conflicts arise over whether to apply the "substantial-evidence" or the "abuse of discretion" standard of review, or both.

Since under the "due process" provisions of the United States Constitution, the substantial-evidence standard of

review operates to insure the integrity of the fact-finding phase of administrative determinations, provided by statute to be made in adjudicatory hearings, these issues may also involve the constitutional question of whether there is a denial of due process of law as to persons against whom administrative orders are affirmed upon review, wherein there was meaningful misapplication or misapprehension of the substantial-evidence standard of review.

I.

The Court of Appeals meaningfully misapplied the substantial-evidence standard of review when it did not consider all of the evidence of non-deportability.

Pursuant to the guidelines laid down by this Court in *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474 (1951), proper application of the substantial-evidence standard of review to administrative orders made in adjudicatory hearings, requires that Courts of Appeals take into account whatever in the record fairly detracts from the weight of evidence supporting such orders. The Court of Appeals meaningfully misapplied the above formula in this case.

The Court of Appeals in reviewing petitioner's deportation order for "entry without inspection upon a false claim of citizenship" decided that it found unpersuasive the argument that because the immigration authorities were skeptical and questioned petitioner, he had the functional equivalent of an inspection. (Appendix A-1).

The skepticism of immigration officials and their questioning of petitioner at the border was but a single portion of the evidence detracting from petitioner's deportability, and was cited for the limited purpose of establishing that such questioning and skepticism was the significant first step in an inspection as an alien, within the meaning of immigration regulations at 8 CFR Part 235.1(b). Under these regulations, an inspection as an alien *commences*

when an applicant for entry into the United States fails to satisfy the examining officer that he is a United States citizen.

In addition to the above, petitioner had cited from the administrative record other "detracting" evidence. This evidence consisted of (a) the six-hour surveillance within the inspection station area to which petitioner had been subjected by one of the officers who originally questioned him; (b) petitioner's arrest within the inspection station area by the same officer surveilling him and with deportation charges prepared at least an hour prior to his arrest; (c) the serious conflict as to whether, as alleged by respondent in its brief, petitioner's alienage and true identity were first known *after* his arrest at 5:00 p.m.; or whether, as contended by petitioner in his reply brief, the immigation authorities were satisfied *during* initial examination that petitioner was an alien and not the citizen he claimed to be; and that the decision to let him proceed to the bus station was for the purpose of putting him under surveillance and did not constitute either an acceptance of his citizenship claim or an entry.

Upon the basis of all the "detracting" evidence, petitioner requested the Court of Appeals to remand his case to the administrative authorities so that at a reopened hearing, a redetermination of deportability could be made, pursuant to the "clear, convincing and unequivocal standard" of *Woodby* v. *INS,* 385 U.S. 276 (1966).

However, as is evidenced from the memorandum decision, at Appendix A-1, it appears that the Court of Appeals, contrary to the mandate of 8 U.S.C. § 1105(a)(4), reviewed the evidence of deportability through consideration of only one portion of the "detracting" evidence, which petitioner had cited to show his possible non-deportability. Under 8 U.S.C. § 1105(a)(4), deportation orders must be reviewed for substantiality of supporting evidence in the

record as a *whole*. Petitioner's deportation order should have been reviewed through consideration of not only the fact that the immigration officials were skeptical and questioned petitioner at the border; review should also have been made through consideration of all other available "detracting" evidence which petitioner cited to show that his claim of citizenship was not accepted; and that such claim did not defeat the inspection process required of aliens; and accordingly that he was not deportable for entry without inspection, within the meaning of *Reid, supra.*

Petitioner submits that where the Court of Appeals considered only one of the many submitted items of "detracting" evidence of non-deportability, such limited consideration, in affirming the deportation order, constituted a meaningful misapplication of the substantial-evidence standard of review mandated by 8 U.S.C. § 1105(a)(4). From the decision of the Court of Appeals at Appendix A-1, it also appears that there is substantial doubt as to whether the Court carried out the general mandate of 5 U.S.C. § 706 that ". . . in making the foregoing determinations the Court shall review the whole record or those parts of it cited by a party . . ."

The above misapplication of the substantial-evidence standard of review appears to fall within this Court's criteria for intervening in this area, which is otherwise the exclusive jurisdiction of the Courts of Appeals. See *Universal Camera Corp.* v. *NLRB, supra; Mobil Oil Corp.* v. *F.P.C.*, 417 U.S. 283 (1974).

II.

The Court of Appeals misapprehended that the subtantial-evidence standard of review may be applicable to findings of fact supporting some discretionary determinations, if provided by statute to be made in an adjudicatory hearing.

It appears from another memorandum decision of the Court of Appeals, at Appendix A-2, that the findings of fact articulated as the basis for denying petitioner voluntary departure in lieu of deportation, was reviewed by the "abuse of discretion" standard and not by the "substantial-evidence" standard, as requested by petitioner.

Under 5 U.S.C. § 706(2)(E), the substantial-evidence standard of review is applicable not only to determinations mandated by statute to be made in an evidentiary hearing, but also to determinations which are provided by statute to be made in other types of agency hearings. (See Attorney General's Manual on the Administrative Procedure Act (1947) p. 109). It is submitted that provision is made in 8 U.S.C. § 1254(e), for consideration, during the deportation hearing, of applications for voluntary departure in lieu of deportation. Therefore the substantial-evidence standard is applicable within the meaning of 5 U.S.C. § 706(2)(E).

The Immigration and Nationality Act allows for two different forms of discretionary grants of voluntary departure, in 8 U.S.C. § 1252(b) and in § 1254(e) respectively. Pursuant to § 1252(b), an alien may be permitted to depart voluntarily without deportation proceedings. Pursuant to § 1254(e) an alien "under deportation proceedings" may be permitted to depart voluntarily "in lieu of deportation." Available only to aliens who are "under deportation proceedings" for specified grounds of deportability, this latter form of voluntary departure is "in lieu

of deportation'' because, after deportability is established in the deportation hearing, its grant serves to withhold entry of the deportation order by the Special Inquiry Officer. The twin statutory provisions in § 1254(e) of ''in lieu of deportation'' and ''under deportation proceedings'', allow for this form of voluntary departure, to be granted only during the period when the deportation hearing begins and before the deportation order is entered and closes the proceedings. Consequently, the initial decision to grant voluntary departure, which withholds entry of the deportation order, can be made by the Special Inquiry Officer only in the deportation hearing. This construction of § 1254(e), is compatible with its implementation in the immigration regulations under 8 CFR 242.17(b), whereby a Special Inquiry Officer determines in the deportation hearing whether voluntary departure in lieu of deportation should be granted, and whereby the District Director, pursuant to 8 CFR 244.2, considers extensions of the voluntary departure time allotted by the Special Inquiry Officer. Since provision is made in § 1254(e), for consideration during the deportation hearing of applications for voluntary departure in lieu of deportation, such applications are unlike applications for other types of discretionary relief, which are considered during the deportation hearing, perhaps for purposes of administrative efficiency in facilitating disposition of the entire matter at the same time.

In the broader context of general administrative law, decisions of this Court as well as decisions of Courts of Appeals definitively hold that the substantial-evidence standard of review is applicable to determinations mandated by statute to be made in evidentiary hearings, as well as to determinations provided by statute to be made in other types of agency hearings; but such decisions leave unresolved the particular issue raised by this case. See *Citizens to Preserve Overton Park Inc.* v. *Volpe,* 401 U.S. 402 (1971); *Camp* v. *Pitts,* 411 U.S. 138 (1973); *Bowman*

Transportation Inc. v. *Arkansas Best Freight System, Inc.,* 419 U.S. 281 (1975); *National Nutritional Foods Ass'n.* v. *Weinberger,* 512 F.2d. 688 (1975). The determination at issue in this case is one which, in addition to being provided by statute to be made in an agency hearing, is also committed to agency discretion by the same statute. Under such statutory scheme, does the "abuse of discretion" standard prevail over the otherwise applicable ''substantial-evidence" standard? Petitioner submits that as to findings of fact, made in an agency hearing provided for by statute, they are reviewable by the substantial-evidence standard, quite apart from whether or not there was any abuse in connection with exercising discretion.

In the narrower context of Immigration and Nationality law, the specific issue now raised by petitioner has not previously been, but should now be, resolved by this Court. Before enactment in 1961 of 8 U.S.C. § 1105(a), and on the closely related question of whether a discretionary denial of suspension of deportation could be based upon evidence not in the record of the deportation hearing, this Court held that the suspension of deportation statute, 8 U.S.C. § 1254(a), makes no provision for applications for suspension of deportation to be considered in the deportation hearing, and that the discretion of the Attorney General was unfettered. However, this decision in the context of the Administrative Procedure Act does not appear to dispose of the issue now raised by petitioner. [See *Jay* v. *Boyd,* 351 U.S. 345 (1956)]. After enactment of 8 U.S.C. § 1105(a) this Court, in *Foti* v. *INS,* 375 U.S. 306 (1963), without deciding this issue, commented at pp. 313-314, that the substantial-evidence scope of review found in § 1105(a)(4), may be limited to adjudications of deportability and may not be applicable to denials of discretionary relief from deportation wherein judicial review is "concededly limited to determinations of whether there has been any abuse of administrative discretion."

This case, in effect, squarely presents for decision the collateral issue commented on but not decided by this Court in *Foti* v. *INS, supra.* The subsidiary question presented by this issue is that of whether findings of fact, supporting a denial of voluntary departure in lieu of deportation, may be reviewed by the substantial-evidence standard mandated by 8 U.S.C. § 1105(a)(4) for findings of fact supporting deportation orders, since under the authority of *Foti* a denial of discretionary relief is a reviewable "deportation order" within the meaning of § 1105(a). The term "deportation order" is not to be equated with, and limited to, the finding as to deportability. Denial of voluntary departure in lieu of deportation is, in effect, entry of the deportation order. As such, this form of discretionary relief is, among others, the most intimate constituent element of the deportation order.

It is submitted that a denial of voluntary departure in lieu of deportation is reviewable by the substantial-evidence standard of § 1105(a)(4), with respect to the *findings of fact* articulated as the basis for denial. However, the denial itself, supported by such findings, is reviewable by the "abuse of discretion" standard.

The above construction of 8 U.S.C. § 1105(a)(4), appears to reflect a specific application, in the field of Immigration & Nationality Law, of the overall provision of the Administrative Procedure Act in 5 U.S.C. § 706(2)(E), that the acid test for applicability of the substantial-evidence standard is that of whether the determination being reviewed was provided by statute to be made in an agency hearing.

CONCLUSION

For all the foregoing reasons petitioner prays that the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

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August 25, 1976

APPENDIX "A"

Order Denying Petition for Review by the Court of Appeals.

75-4207

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

MILTON EVEREST MITCHELL,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

A petition to review an order of the Board of Immigration Appeals.

This cause came to be heard on the administrative record of the Immigration and Naturalization Service and was argued by counsel.

On consideration thereof, it is now hereby ordered, adjudged and decreed that the petition for review is denied on the authority of *Reid* v. *I.N.S.*, 420 U.S. 619 (1975) and *Pereira-Barreira* v. *U.S. Dept. of Justice*, 523 F.2d 503 (2d Cir. 1975). We find unpersuasive the argument that because the immigration authorities were skeptical and questioned petitioner, he had the "functional equivalent of inspection." We have examined *in camera* an intra-agency report as requested by petitioner's counsel and find that the non-disclosure thereof at the hearing in no way affected petitioner's rights.

J. EDWARD LUMBARD
JAMES L. OAKES
WILLIAM H. TIMBERS

April 7, 1976

Order Denying Motion to Recall Mandate.

Pursuant to Rule 41(b) F.R.A.P.

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75-4207

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 13th day of May, one thousand nine hundred and seventy-six.

MILTON EVEREST MITCHELL,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

It is hereby ordered that the motion made herein by counsel for the petitioner dated April 21, 1976 to recall the mandate and to stay its reissuance pending application to the Supreme Court of the United States for a writ of certiorari pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure in the event the petition for rehearing or rehearing en banc is denied be and it hereby is denied, no abuse of discretion being demonstrated in connection with the denial of voluntary departure in lieu of deportation.

J. EDWARD LUMBARD
JAMES L. OAKES
WILLIAM H. TIMBERS

Order Denying Petition for Rehearing and Rehearing En Banc.

75-4207

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 2nd day of June, one thousand nine hundred and seventy-six.

MITCHELL EVEREST MITCHELL,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

A petition for rehearing containing a suggestion that the action be reheard en banc having been filed herein by counsel for the petitioner, Milton Everest Mitchell, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

IRVING R. KAUFMAN
Chief Judge

Order Denying Petition for Rehearing and Rehearing En Banc.

75-4207

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the second day of June, one thousand nine hundred and seventy-six.

MILTON EVEREST MITCHELL,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

A petition for a rehearing having been filed herein by counsel for the petitioner, Milton Everest Mitchell,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

J. EDWARD LUMBARD
JAMES L. OAKES
WILLIAM H. TIMBERS
Circuit Judges

Order Denying Petition for Rehearing and Rehearing En Banc.

75-4207

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 19th day of August, one thousand nine hundred and seventy-six.

MILTON EVEREST MITCHELL,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

It is hereby ordered that the motion made herein by counsel for the petitioner dated August 5, 1976 to reconsider the denial of a petition for rehearing and rehearing *en banc*
be and it hereby is denied.

J. EDWARD LUMBARD
JAMES L. OAKES
WILLIAM H. TIMBERS
Circuit Judges

Order Denying Petition for Rehearing and Rehearing En Banc.

75-4207

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 19th day of August, one thousand nine hundred and seventy-six.

MILTON EVEREST MITCHELL,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

It is hereby ordered that the motion made herein by counsel for the petitioner dated August 5, 1976 to reconsider the denial of an application to recall the mandate and stay its reissuance pending application to the Supreme Court of the United States for a writ of certiorari pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure be and it hereby is denied.

J. EDWARD LUMBARD
JAMES L. OAKES
WILLIAM H. TIMBERS
Circuit Judges

APPENDIX "B"

TITLE 5 UNITED STATES CODE

§ 706

Scope of Review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.
The reviewing court shall— . . .

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . .

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute;

In making the foregoing determinations, the Court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error. Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 393.

Appendix "B".

TITLE 8 UNITED STATES CODE

Immigration and Nationality Act

§ 1105a. Judicial review of orders of deportation and exclusion—Exclusiveness of procedure

(a) The procedure prescribed by, and all the provisions of sections 1031 to 1042 of Title 5, shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 1252(b) of this title or comparable provisions of any prior Act, . . .

Determination upon administrative record

(4) except as provided in Clause (B) of paragraph (5) of this subsection, the petition shall be determined solely upon the administrative record upon which the deportation order is based and the Attorney General's findings of fact if supported by reasonable, substantial, and probative evidence on the record considered as a whole, shall be conclusive;

§ 1251. Deportable aliens—General classes

(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who— . . .

(2) entered the United States without inspection or at any time or place other than as designated by the Attorney General or is in the United States in violation of this chapter or in violation of any other law of the United States;

Appendix "B".

§ 1254(e) Voluntary departure

The Attorney General may, in his discretion, permit any alien under deportation proceedings, other than an alien within the provisions of paragraph (4), (5), (6), (7), (11), (12), (14), (15), (16), (17), or (18) of section 1251(a) of this title (and also any alien within the purview of such paragraphs if he is also within the provisions of paragraph (2) of subsection (a) of this section), to depart voluntarily from the United States at his own expense in lieu of deportation if such alien shall establish to the satisfaction of the Attorney General that he is, and has been, a person of good moral character for at least five years immediately preceding his application for voluntary departure under this subsection.

Appendix "B".

CODE OF FEDERAL REGULATIONS

Title 8

Part 235. Inspection of persons applying for admission.

235.1— Scope of Examination

(a) General . . .

(b) U.S. citizens. A person claiming U. S. citizenship must establish that fact to the examining immigration officer's satisfaction and must present a U. S. passport if such passport is required under the provisions of 22 CFR Part 53. If such an applicant for admission fails to satisfy the examining immigration officer that he is a U. S. citizen, he shall thereafter be inspected as an alien.

Supreme Court, U. S.
FILED
SEP 8 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-306

MILTON EVEREST MITCHELL,

Petitioner,

against

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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APPENDIX C

Oral Decision of Immigration Judge

UNITED STATES DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

File: A20 378 726—Buffalo, New York August 6, 1974

In the Matter of)
MILTON EVEREST MITCHELL) IN DEPORTATION PROCEEDINGS
Respondent)

CHARGES: I & N Act—Section 241(a)(2)—Entered without inspection.

APPLICATION: Voluntary Departure

IN BEHALF OF RESPONDENT:	IN BEHALF OF SERVICE:
Leo E. Ypsilanti, Esquire 225 Broadway New York, New York 10007	Gordon W. Sacks Trial Attorney Buffalo, New York

ORAL DECISION OF THE IMMIGRATION JUDGE AUG. 6, 1974

The respondent is a 38-year-old married male alien, a native and citizen of Trinidad who last entered the United States of Niagara Falls, New York on August 5, 1974 at which time he presented a birth certificate relating to a Mr. Oliver who had been born in the United States and claimed to be a citizen of the United States. He was in fact admitted as a citizen thereof and thereby avoided inspection as an alien by United States Immigration Officers. He was subsequently apprehended and placed under proceedings. It is clear that the charge contained in the Order to Show Cause is sustained and the respondent is deportable as charged.

The respondent applied for the privilege of voluntary departure from the United States in lieu of deportation. He has testified that he has never been arrested or had any difficulties with the police. However, the record indicates that the respondent obtained the birth certificate showing birth in the United States from Oliver approximately three months ago apparently with an idea of using it as an identity paper if necessary and certainly with the idea of using it on his trip to Canada. He went to Canada with a male friend and two female friends and he stated the reason he did not go with his wife was because they had an argument shortly before. The respondent drove to Canada in his 1973 Mercedes car which he states is worth approximately $10,000 on which he has only one year's payments left. They rented two rooms at a hotel in Toronto and he states that the two girls who accompanied him were in and out of those rooms but had no separate quarters. The alleged purpose of the trip to Toronto was to see a Trinidad festival which was taking place in Canada.

Respondent is married to a citizen of the United States, has one child born in this country who is eight years of age. He claims that last year he earned $15,000 as a house painter but also admits that he paid no federal income tax last year and although this matter was mentioned and discussed with an attorney, he had still filed no income tax for 1973.

Upon consideration of all the facts and records I find the respondent does not warrant the relief he has requested as a matter of administrative discretion. The record shows that he clearly planned for this trip to Canada. He planned his fraudulent return to the United States with a birth certificate which did not belong to him. It is highly probable that he committed adultery on his last trip to Toronto and that he has not paid his income tax for 1973. When this is coupled with the possession of a car worth $10,000,

there is certainly room for doubt as to what activities the respondent is engaged in. In any event, the circumstances of this case do not warrant the grant of voluntary departure as the matter of administrative discretion. I wish to note that the respondent has had an application for an immigrant visa under processing by an attorney in New York but had failed to take any action on it, claiming that he did not have sufficient money with which to pursue it. He has indicated that if he was deported he wishes to be sent to Trinidad.

ORDER: IT IS ORDERED that the respondent be deported from the United States to Trinidad on the charge contained in the Order to Show Cause.

IRA FIELDSTEEL
Ira Fieldsteel
Immigration Judge

APPENDIX D

Decision of Board of Immigration Appeals July 28, 1975

BOARD OF IMMIGRATION APPEALS

Washington, D.C. 20530

July 28 1975

File: A20 374 726—Buffalo

In re: MILTON EVEREST MITCHELL

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Leo E. Ypsilanti, Esquire
Edward Kroin, Esquire
225 Broadway
New York, New York 10007

ON BEHALF OF I&N SERVICE: Anthony M. DeGaeto
Appellate Trial Attorney

ORAL ARGUMENT: March 19, 1975

CHARGES:

Order: Section 241(a)(2), I&N Act (8 U.S.C. 1251 (a)(2)) — entered without inspection

APPLICATION: Reopening of proceedings

This case presents an appeal from a decision of the immigration judge on August 6, 1974, finding the respondent deportable and ordering his deportation to Trinidad, on the charge contained in the Order to Show Cause. He denied the respondent's application for the privilege of voluntary

departure. Reopening of these proceedings will be denied and the appeal will be dismissed.

The respondent is a native and citizen of Trinidad, who entered the United States without inspection at Niagara Falls, New York, in August 1974, upon a false claim of United States citizenship. Deportability has been established by clear, convincing and unequivocal evidence.

The immigration judge, noting that the respondent obtained a birth certificate relating to a Mr. Oliver, approximately 3 months prior to his reentry into the United States from Canada, with a male friend and two female friends, concluded that the respondent had deliberately planned his fraudulent return to this country. Noting also that it was "highly probable" that the respondent committed adultery on his trip to Toronto and also that he had failed to pay his income tax for the year of 1973, the immigration judge further concluded that the circumstances of this case do not warrant the grant of the privilege of voluntary departure as a matter of administrative discretion. On appeal, counsel challenges the immigration judge's decision on the ground that the respondent is saved from deportation by the provisions of section 241(f) of the Immigration and Nationality Act, as amended, and at the very least, as the husband and the father of United States citizens, he should be granted the privilege of voluntary departure.

We have carefully reviewed the record and find that due to the respondent's intentionally false claim to United States citizenship after his entry from Canada without inspection, he is not entitled to the benefits of section 241(f) of the Act. See *Reid* v. *INS*, —— U.S. ——, 95 S.Ct. 1164 (1975). In the latter case, the Supreme Court held that section 241(f) does not benefit an alien who has entered the United States under a false claim to United States citizenship and was charged with deportability under section 241(a)(2) of the Act. See *Matter of Joquin*, Interm Decision —— (BIA June 11, 1975); *Matter of Munguia*, Interim Decision —— (BIA May 5, 1975). The respondent's deportation, therefore, is not precluded by sec-

tion 241(f) of the Act. Acordingly, termination of these proceedings is not warranted even if, as alleged, the respondent went to Canada for the sole purpose of attending a Caribbean Festival in Toronto.

We further find, in view of the adverse factors set forth in the decision of the immigration judge, that his denial of the respondent's application for the privilege of voluntary departure was correct. Accordingly, the motion to reopen these proceedings will be denied and the decision of the immigration judge will be affirmed.

ORDER: The appeal is dismissed.

FURTHER ORDER: The motion to reopen these proceeding is denied.

Louisa Wilson
Acting Chairman

APPENDIX E

Petitioner's motion requesting reconsideration of Decision by the Board of Immigration Appeals

U. S. Dept of Justice
Board of Immigration Appeals
Washington, D.C.

File No. A20 374 726

In the Matter of the Appeal of:

MILTON EVEREST MITCHELL,
Respondent.

BRIEF

IN SUPPORT OF MOTION TO RECONSIDER
DISMISSAL OF APPEAL

This is a Motion requesting reconsideration by the Board of its decision and order dated July 28, 1975.

The order and decision of the Board on which reconsideration is requested reads in pertinent part as follows:

> ". . . On appeal, counsel challenges the Immigration judge's decision on the ground that the respondent is saved from deportation by the provisions of section 241(f) of the Immigration and Nationality Act, as amended, and at the very least, as the husband and the father of United States citizens, he should be granted the privilege of voluntary departure.
>
> We have carefully reviewed the record and find that due to the respondent's intentionally false claim to United States citizenship after his entry from Canada without inspection, he is not entitled to the benefits of

section 241(f) of the Act. See *Reid* v. *INS*, U.S., 95 S.Ct. 1164 (1975). In the latter case, the Supreme Court held that section 241(f) does not benefit an alien who has entered the United States under a false claim to United States citizenship and was charged with deportability under section 241(a)(2) of the Act. . . ."

Reconsideration is requested because the Board's decision appears to indicate that consideration was given only to the original grounds challenging the Immigration Judge's decision, namely,

(a) the applicability of Section 241(f) on the case law as existed prior to the Supreme Court's decision in Reid vs. INS; and

(b) the granting of the privilege of voluntary departure.

The Board's decision of July 28, 1975 does not appear to indicate that due consideration was given to the later and distinctly separate challenge of the very validity of the sustaining of the charge of deportation itself that was found in "Point I-A" of the respondent's supplemental brief dated April 8, 1975.

That other part of the decision of the Board which asserts that "deportability was established by clear, convincing and unequivocal evidence" does not appear to address itself to the fundamental issues raised by respondent's counsel, with respect to the request found in "Point I-A" of the supplemental brief dated April 8, 1975.

Respondent's counsel had included an additional reason why OPENING OF THE PROCEEDINGS was warranted, which, even though related to the question of 241(f) benefits, was also an *independent* and *separate* ground upon which termination of proceedings could have been requested at a reopened hearing.

Respondent's counsel had indicated, in essence, that even though the respondent's deportability may have been established, at the deportation hearing, by the clear, convincing and unequivocal evidence adduced from the respondent's admissions at his deportation hearing where he was unrepresented by counsel, information relating to the fact that respondent had been under constant surveillance by the Border Patrol Agent, Cipolini, would cast some doubt on the following questions:

1) Did the survelliance of the respondent begin before entry, when his citizenship claim was doubted, and continue up to the point of arrest?

2) If this was established at a reopened hearing through the testimony of the respondent and the Border Patrol Agent, did such surveillance affect the question of whether his entry was actually without inspection, AS THAT TERM IS USED IN THE CASE LAW CONSTRUING ENTRY ON FALSE CLAIMS OF CITIZENSHIP, AS ENTRY WITHOUT INSPECTION, FOR DEPORTATION PURPOSES, UNDER SECTION 241(a)(2) OF THE ACT.

3) Whether the Immigration Judge could, at a reopened hearing, upon such evidence additional to the prior admissions *alone* of the respondent, entertain a Motion for termination of proceedings on the ground that what had previously been clear, convincing and unequivocal evidence of deportability at the original deportation hearing might now, in the light of the additional information, be substantially less than a clear, convincing and unequivocal standard for sustaining deportability.

Respondent's counsel had felt that the Border Patrol Agent's affidavit submitted as additional evidence would have constituted new evidence for the purpose of reopening for the additional reason of applying for termination on the grounds that deportability was not established.

In the event that the affidavit of the Border Patrol Agent was not considered sufficient by the Board for the purpose

mentioned above, there is presented at this time two affidavits, one by the respondent himself, and another by one of the passengers in his car, containing information which, it was intended, would be submitted as oral evidence in the open forum of a reopened hearing.

These affidavits indicate the strong possibility that because the respondent had appeared for entry into the United States in a Canadian taxicab without luggage after a three-day stay in Canada, this had prompted the suspicion of the Border Patrol and Immigration inspectors, as was indicated by the officers' questioning him intently for at least half an hour concerning the birth certificate and his identity.

The information in these affidavits also indicates that because the officers knew that he was destined to rendezvous with someone else within the inspection area since he had no luggage or means of transport to New York City, they had permitted him to enter the United States, even though they had such serious doubts about his identity and U. S. citizenship; and it is highly probable that they had permitted him to enter for surveillance as to what he was really up to.

Respondent's counsel strongly urges the Board to especially consider this additional reason for reopening proceedings as one which goes to the very fundamental question of whether or not the earlier sustaining of deportabiilty by clear, convincing and equivocal evidence adduced from the respondent's *admissions alone* at the deportation hearing would meet the same test of clear, convincing and unequivocal evidence if the allegations of the respondent's surveillance are established during a reopened hearing.

Respondent's counsel strongly urges the Board to especially consider the fact that the respondent had not presented any of the evidence of his surveillance at the original deportation hearing, and would respectfully redirect the

attention of the Board to the transcript of the respondent's testimony, without the assistance of counsel, at the original deportation hearing.

On page 2, lines 1 through 18, of the transcript of hearing, respondent had answered "yes" to a series of questions put to him by the Immigration Judge, which answers, without the assistance of counsel, constituted his not only making admissions of fact, but also his drawing conclusions of law that were very technical and complex.

It is noted that respondent, without the assistance of counsel, could not, and did not, introduce any evidence concerning the details of his surveillance, entry and alleged lack of inspection; and such evidence would have been a valid defense against deportability.

See Matter of C-V Adm. Dec. Vol. I at page 387.

> ". . . These two cases cited above, we feel, set forth the proper line of demarcation when the charge under consideration is supported and when not supported To summarize, the charge should be used only in those situations in which the inspection contemplated by the Immigration Act of 1917 could not have been held because of the acceptance by the Immigrant Inspector of the applicant's false claims to United States citizenship, and the consequent lack of jurisdiction to proceed with the inspection. . . ."

It is noted that the Board was citing the two leading court cases consistently relied upon for construing deportability for entry without inspection on a false claim of citizenship. Ex parte Gouthro, 296 F. 506 and ex parte Saadi, 23 F.2d 334, Affd. 26 F.2d 458, Cert. denied 278 U.S. 616.

Respondent's counsel strongly urges the Board to give the respondent his day in court to interpose a valid defense against his deportability, particularly since, without an

intelligent waiver of counsel, he had proceeded on his own and had not then presented the facts of the doubts about his citizenship status and his continued surveillance which are germane to his charge of deportability.

Reconsideration is also requested of the Board's decision of July 28, 1975 as it pertains to disposing of the respondent's claim for eligibility under Section 241(f) of the Act.

Respondent's counsel had contended that the very decision of the Supreme Court in *Reid vs. INS* 95 S.Ct. 1164 (1975) had raised a very important question of the applicability of Section 241(f) in circumstances where a charge of deportability, for entry without inspection on a false claim of citizenship, is sustained WITH OR WITHOUT THE IMPORTANT ELEMENT OF THE ALIEN'S EXCLUDABILITY FOR FRAUD AT THE TIME OF ENTRY.

Respondent's counsel had further contended that even though the main thrust of the Supreme Court's decision in *Reid vs. INS* supra was to preclude Section 241(f) benefits from aliens charged with deportability, under Section 241(a)(2), for having entered without inspection under a false claim of citizenship, this preclusion exists only if the *sustaining of such deportability was* QUITE INDEPENDENT of the important element of excludability for fraud.

Relying on this provision claimed to be found in the *Reid vs. INS* decision of the Supreme Court, respondent's counsel had, in the supplemental brief dated April 8, 1975, receded from the earlier position taken in the Motion to Reopen dated January 16, 1975 that 241(f) benefits for the respondent were identical to the matter of *Reid vs. INS* then pending before the Supreme Court of the United States.

Respondent's counsel had modified that portion of the Motion to Reopen for applying for Section 241(f) benefits in the following manner:

a) the respondent would only apply for the benefits of Section 241(f) if his earlier application, at such reopened hearing, to terminate the proceedings on the non-sustaining of the deportation charge itself on the grounds cited heretofore, was rejected.

b) that even if respondent should fail, at a reopened hearing, to have deportation proceedings terminated on the grounds that a charge of entry without inspection had not been established, a reopened hearing would also provide a fair opportunity for the respondent to establish that, even though his deportability for entry without inspection might be considered as sustained, there is the additional question to be resolved as to whether such sustaining was quite independently of his excludability for fraud.

c) that because of the difference between the circumstances of his entry and inspection and the entry and inspection in the REID case, the valid possibility exists that the respondent could, at a reopened hearing, establish that any sustaining of his deportability was *not quite independently* of excludability for fraud, and therefore, he is not precluded from the benefits of Section 241(f).

Respondent's counsel strongly urges that the Motion, as subsequently modified, to reopen deportation proceedings is for the purpose of:

1. questioning the validity of the sustaining of the original Order of Deportation, and

2. applying for Section 241(f) benefits on the grounds that, unlike REID, such *sustaining* was not quite independent of the important element of excludability for fraud, EVEN IF the validity of the original order of deportation is upheld.

WHEREFORE, respondent's counsel respectfully requests that since respondent was not represented by counsel at his original deportation hearing, that he be given a fair

opportunity to raise the substantial question of facts and the germaneness of such facts to questions of law discussed above.

Respectfully submitted,

Leo E. Ypsilanti
LEO E. YPSILANTI
Attorney for Respondent
Office and P.O. Address
225 Broadway
New York, N. Y. 10007
(212) 964-2055

Dated: New York, N. Y.
August 15, 1975

APPENDIX F

Decision of Board of Immigration Appeals September 18, 1975

(Emblem)

UNITED STATES DEPARTMENT OF JUSTICE

BOARD OF IMMIGRATION APPEALS

Washington, D.C. 20530

Sep 18 1975

File: A20 374 726—Buffalo

In re: MILTON EVEREST MITCHELL

IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Leo E. Ypsilanti, Esq.
225 Broadway
New York, New York 10007

CHARGE:

Order: Sec. 241(a)(2), I&N Act (8 U.S.C. 1251 (a)(2))—Entered without inspection

APPLICATION: Motion to reconsider; stay of deportation

In a decision dated July 28, 1975, we dismissed the respondent's appeal from an immigration judge's order of deportation. The respondent has submitted a motion requesting that we reconsider our decision of July 28, 1975. The motion will be denied.

The respondent is a native and citizen of Trinidad who was admitted to the United States upon a wilful false claim to United States citizenship. He made an entry upon being admitted by the immigration officer at the border. Section 101(a)(13), Immigration and Nationality Act; see *Matter of V-Q-*, 9 I&N Dec. 78 (BIA 1960). The

respondent was not then inspected as an alien. See generally *Matter of Wong,* 11 I&N Dec. 712 (BIA 1966). He was therefore correctly found deportable under section 241(a)(2) as an alien who had entered the United States without inspection. *Reid* v. *INS,* 420 U.S. 619, 624-25 (1975). Any surveillance of the respondent due to the suspicious nature of his activities does not alter the fact that he made an entry or that that entry was accomplished without inspection.

We thoroughly discussed the respondents' section 241 (f) claim in our decision of July 28, 1975. The existence of fraud is irrelevant because section 241(f) does not apply to a section 241(a)(2) "entry without inspection" charge. *Reid* v. *INS,* supra.

The respondent has requested a stay of deportation. That request will also be denied.

ORDER: The motion to reconsider and the request for a stay of deportation are denied.

DAVID L. MILHOLLAN
Chairman

Supreme Court, U. S.
FILED
NOV 29 1976
MICHAEL RODAK, JR., CLERK

No. 76-306

In the Supreme Court of the United States

OCTOBER TERM, 1976

MILTON EVEREST MITCHELL, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

RICHARD L. THORNBURGH,
Assistant Attorney General,

JEROME M. FEIT,
ROBERT J. ERICKSON,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-306

MILTON EVEREST MITCHELL, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED

1. Whether the administrative determination of deportability was "supported by reasonable, substantial, and probative evidence on the record considered as a whole."

2. Whether "substantial evidence" must support the Attorney General's discretionary decision to deny a person the privilege of voluntary departure.

STATEMENT

Petitioner is a native and citizen of Trinidad. He last entered the United States on August 5, 1974, falsely claiming to be a United States citizen. Petitioner successfully gained admission at the Canadian border by presenting to the immigration officials the birth certificate of Cariel Wesley Oliver, a deceased citizen (R.

9, R. 14, R. 20 pp. 2, 8-9).[1] Petitioner's arrival without luggage in a taxi made officials suspicious, however, and they placed him under surveillance (Pet. 4). After two of petitioner's friends brought his car into the country, petitioner was questioned in a bus depot by immigration officials and admitted that he had falsely represented his citizenship in order to gain entry into the United States (R. 9).

Deportation proceedings were instituted charging petitioner with entering the United States without inspection, in violation of Section 241(a)(2) of the Immigration and Nationality Act, 66 Stat. 163, 204, 8 U.S.C. 1251(a)(2) (R. 21). Petitioner conceded the facts necessary to deport him[2]

---

[1]"R." refers to the documents contained in the certified administrative record.

[2]See R. 20, pp. 1-2:

> [Judge] Q. * * * Is it true that you are not a citizen of the United States?
>
> [Petitioner] A. Yes, sir.
>
> Q. Is it true that you are a native and citizen of Trinidad?
>
> A. Yes, sir.
>
> Q. Is it true that you last entered the United States at Niagara Falls, New York at the Rainbow Bridge yesterday, August 5, 1974?
>
> A. Yes, sir.
>
> Q. And is it true that the officers admitted you as a citizen of the United States?
>
> A. Yes, sir.
>
> Q. But you are not a citizen of the United States?
>
> A. Yes, sir.
>
> Q. Now by entering as a citizen you avoided inspection as an alien and you are technically subject to deportation. Do you understand that?

and applied for the discretionary privilege of voluntary departure.

The immigration judge declined to grant petitioner the discretionary privilege of voluntary departure (R. 19). The immigration judge wrote that although petitioner was married to a United States citizen and had one child born in this country, he had planned his fraudulent entry into the United States, had failed to pay his income taxes, had probably engaged in adultery (an activity that would, by statute, preclude a finding of good moral character under Section 101(f) of the Immigration and Nationality Act, 8 U.S.C. 1101(f), and thereby render him ineligible for voluntary departure), and had failed to take any action with respect to obtaining an immigrant visa to normalize his immigration status during the 14 years since his initial entry in 1960.[3]

Petitioner appealed the decision denying him voluntary departure and, during the pendency of the appeal, also moved to reopen his deportation proceeding in order to apply for relief under Section 241(f) of the Immigration and Nationality Act, as added, 75 Stat. 655, 8 U.S.C. 1251(f).[4] The Board of Immigration Appeals dismissed

---

> A. Yes, sir.
>
> Q. Now, you want the opportunity of leaving the United States voluntarily at your own expense instead of being deported?
>
> A. Yes, yes.

[3]Petitioner first entered the United States in 1960 as a non-immigrant visitor for pleasure, and he failed to depart at the expiration of his authorized visitation. From then until his trip to Canada in 1974 he illegally resided and worked in the United States (R. 20, pp. 5-6).

[4]Section 241(f) provides:

> The provisions of this section relating to the deportation of aliens within the United States on the ground that they were

the appeal, finding that "[d]eportability has been established by clear, convincing, and unequivocal evidence"; that petitioner, as an alien who had entered this country under a false claim of citizenship, was ineligible for Section 241(f) relief; and that the request for voluntary departure had been properly denied (R. 7). The court of appeals affirmed (Pet. App. A1).

ARGUMENT

1. *Reid* v. *Immigration and Naturalization Service*, 420 U.S. 619, held that Section 241(f) relief is not available to an alien who escapes inspection at the border by entering this country under a false claim of citizenship. Petitioner attempts to avoid the effect of *Reid* by arguing that, despite his entry under a false claim of citizenship, he received the functional equivalent of inspection, and that in concluding otherwise the court of appeals improperly failed to consider the "evidence on the record * * * as a whole," as required by Section 106(a)(4), as added, 75 Stat. 651, 8 U.S.C. 1105a(a)(4).

Petitioner's argument depends upon the fact that the immigration officers were skeptical of his claim of citizenship and subjected him to questioning at the border. He asserts that this was tantamount to the "inspection" to which a known alien would be subjected. But 8 C.F.R. 235.1(b) requires that a person seeking to enter

---

excludable at the time of entry as aliens who have sought to procure, or have procured visas or other documentation, or entry into the United States by fraud or misrepresentation shall not apply to an alien otherwise admissible at the time of entry who is the spouse, parent, or a child of a United States citizen or of an alien lawfully admitted for permanent residence.

the country as a citizen establish his citizenship and provides that an immigration officer may conduct an "examination" until he is satisfied that the claim of citizenship is true. No more occurred here. Petitioner satisfied the officer of the truthfulness of his claim, was allowed freely to enter the United States as a citizen, and wholly avoided the stringent "inspection" procedures to which known aliens are subject.

The "detracting evidence" (Pet. 9) that petitioner claims was improperly disregarded by the court of appeals related to events occurring after his admission as a citizen and, at all events, failed to demonstrate that the administrative finding of deportability was not supported by "reasonable, substantial, and probative evidence." Nothing in petitioner's affidavits—apart from bare speculation—significantly detracts from the officer's affidavit (R. 9) and petitioner's testimony (R. 20, p. 2) that he was admitted as a United States citizen and that his true identity and citizenship were not ascertained until six hours later.

2. Petitioner also contends that the denial of the privilege of voluntary departure was not supported by substantial evidence. But the "substantial evidence" test is reserved by statute for the review of deportation orders. 8 U.S.C. 1105a(a). "Abuse of discretion" is the correct standard for review of denials of voluntary departure. As this Court observed in *Foti* v. *Immigration and Naturalization Service*, 375 U.S. 217, 228:

> Admittedly, the standard of review applicable to denials of discretionary relief cannot be the same as that for adjudications of deportability, since judicial review of the former is concededly limited to determinations of whether there has been any abuse of administrative discretion.

See also *Hintopoulos* v. *Shaughnessy*, 353 U.S. 72, 77.

An alien seeking the privilege of voluntary departure must show both that he is eligible for this relief and that such relief should be granted as a matter of discretion. 8 C.F.R. 242.17(d). The record shows that petitioner procured a fraudulent birth certificate months in advance of his illegal entry into this country for the specific purpose of facilitating that entry; that he failed to file a tax return, even though he had consulted an attorney in the matter; that during his stay in Canada he may have engaged in adultery; and that during the 14 years petitioner had illegally lived in the United States he never attempted to obtain permission to stay here lawfully. Under these circumstances, the denial of the privilege of voluntary departure did not constitute an abuse of discretion.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

RICHARD L. THORNBURGH,
Assistant Attorney General.

JEROME M. FEIT,
ROBERT J. ERICKSON,
Attorneys.

NOVEMBER 1976.

DOJ-1976-11